

United States District Court  
District of Massachusetts

	)	
Korluh Kennedy,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	22-11152-NMG
The Commonwealth of	)	
Massachusetts et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM & ORDER

This case arises out of an alleged warrantless search of the residence of Korluh Kennedy ("Kennedy" or "plaintiff") by Special Agent Joseph Osmanski ("Osmanski" or "defendant") and several other law enforcement officers, including members of the Massachusetts State Police and the Worcester Police Department. Plaintiff filed suit against Osmanski, several members of the Massachusetts State Police and the Commonwealth of Massachusetts ("defendants").

Pending before the Court is Special Agent Osmanski's motion to dismiss.

**I. Background**

**A. Factual History**

At approximately 6:30 a.m. on April 10, 2019, Korluh Kennedy was roused from her sleep by loud banging on her front door at 184 Cohasset Street, Worcester, Massachusetts. When she approached the door, she was confronted by a large group of armed police officers pointing weapons at her and her tenant, a young mother nursing an infant. After Kennedy opened the door, the police officers immediately rushed into her residence, without her consent or a search warrant. The officers told her they were searching for her son, Augustus B. Kormah ("Kormah"), for whom they had an arrest warrant.

Three weeks prior to the search, Kormah was stopped by Massachusetts State Police for a moving traffic violation in Worcester. Kormah consented to a search of his car during which the state police trooper found a small red bag suggestive of Oxycodone. Kormah was arrested and charged with a crosswalk violation and possession of a Class B substance (Oxycodone). He was scheduled for arraignment in the Worcester District Court on March 25, 2019, but he did not appear and the court issued an arrest warrant. Kormah did not reside at his mother's house at the time of the arrest, nor at the time of the search. When the officers burst into her residence, Kennedy immediately informed

them that Kormah did not live there and was not present with her.

Despite being so informed, defendants conducted an extensive search of Kennedy's entire residence, from garage to attic, going through bathrooms, bedrooms and the kitchen, dumping boxes and drawers. Two police K-9 officers brought their dogs into the house to sniff it systematically and one of the dogs urinated on Kennedy's belongings. According to the complaint and the photographs submitted as exhibits to the complaint, the officers completely "trashed" plaintiff's residence, leaving it in "disastrous condition."

After about 45 minutes, Kennedy asked the officers, none of whom had identified themselves to her, if they had a search warrant. Defendant Thiago Miranda, a Massachusetts State Police trooper, told her they did not. When she informed them she would call her lawyer, Miranda and the co-defendants packed up their equipment and left the scene. She asked for their contact information but Miranda refused to reveal his name or identity and failed to mention that he worked for the Massachusetts State Police.

#### **B. Procedural History**

On April 8, 2022, Kennedy filed a ten-count complaint in the Massachusetts Superior Court for Suffolk County. She

alleged violations of 42 U.S.C. § 1983, a Bivens claim for violation of the Fourth Amendment, trespass, invasion of privacy, conspiracy, assault, violation of the Massachusetts Civil Rights Act, M.G.L. c. 112 § 111M, intentional infliction of emotional distress, violation of Massachusetts Public Records Law, M.G.L. c. 66 § 10 and violation of the Massachusetts Torts Claims Act, Chapter 258.

In July, 2022, Osmanski filed a notice of removal with this Court pursuant to 28 U.S.C. § 2679(d)(1), certifying that he was acting within the scope of his employment with the federal government at the time of the incident out of which the complaint arose.

The Commonwealth of Massachusetts promptly moved to sever and remand Counts VIII and IX, the two state law claims against it. In October, 2022, this Court allowed the Commonwealth's motion to sever and remand and dismissed the Commonwealth from the present action.

With respect to the state law claims against Osmanski, the United States ("the government") substituted itself for him and moved to dismiss those claims in September, 2022. The Court allowed the government's motion to dismiss without prejudice to permit plaintiff to exhaust her administrative remedies and then amend her complaint.

On behalf of Osmanski, the government now moves to dismiss plaintiff's Bivens claim against him in his individual capacity. Plaintiff opposes that motion and the American Civil Liberties Union of Massachusetts has filed an amicus brief encouraging the Court to deny the motion to dismiss. For the reasons that follow, the pending motion will be denied.

## II. Motion to Dismiss

### A. Legal Standard

To survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the subject pleading must state a claim for relief that is actionable as a matter of law and "plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is facially plausible if, after accepting as true all non-conclusory factual allegations, the "court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged." Ocasio-Hernandez v. Fortuno-Burset, 640 F.3d 1, 12 (1st Cir. 2011) (quoting Iqbal, 556 U.S. at 678).

When rendering that determination, a court may not look beyond the facts alleged in the complaint, documents incorporated by reference therein and facts susceptible to judicial notice. Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011). A court also may not disregard properly pled

factual allegations even if “actual proof of those facts is improbable.” Ocasio-Hernandez, 640 F.3d at 12 (quoting Twombly, 550 U.S. at 556). Rather, the necessary “inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw.” Id. at 13. The assessment is holistic:

the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible.

Hernandez-Cuevas v. Taylor, 723 F.3d 91, 103 (1st Cir. 2013) (quoting Ocasio-Hernandez, 640 F.3d at 14).

## **B. The Bivens Doctrine**

### **1. Background**

Since 1971, the “Bivens doctrine [has] allow[ed] plaintiffs to vindicate certain constitutionally protected rights through a private cause of action for damages against federal officials in their individual capacities.” DeMayo v. Nugent, 517 F.3d 11, 14 (1st Cir. 2008).

In Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), the plaintiff alleged that Federal Bureau of Narcotics agents entered his New York City apartment without a warrant. In the absence of exigent circumstances or consent, “a warrantless search of the home is

presumptively unconstitutional” under the Fourth Amendment. Groh v. Ramirez, 540 U.S. 551, 564 (2004). Thus, the federal agents unlawfully searched the residence and subsequently arrested plaintiff for narcotics violations in front of his wife and children without probable cause. Bivens, 403 U.S. at 389. The Supreme Court held that a violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages, thus establishing a Bivens claim. Id. at 397.

Throughout the following decade, the Supreme Court extended the cause of action first articulated in Bivens to: (1) a Fifth Amendment due process claim for sex discrimination, David v. Passman, 442 U.S. 228 (1979), and (2) an Eighth Amendment deliberate indifference claim for failure to provide proper medical attention, Carlson v. Green, 446 U.S. 14 (1980). Along with Bivens itself, those three contexts are the sole causes of action recognized by the Supreme Court today under Bivens. Egbert v. Boule, 142 S. Ct. 1793, 1802 (2022).

## **2. Two-Step Analysis**

The Supreme Court uses a two-step inquiry to inform its analysis of a Bivens claim. Id. at 1803:

- (1) First, [the Court] ask[s] whether the case presents a new Bivens context, i.e., is it meaningfully different from the three cases in which the Court

has implied a damages action.

- (2) Second, if a claim arises in a new context, a Bivens remedy is unavailable if there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed.

Id. (quoting Ziglar v. Abbasi, 137 S. Ct. 1843, 1858-60 (2017) (internal quotation marks omitted)); see also González v. Vélez, 864 F.3d 45, 52-53 (1st Cir. 2017). Furthermore, the Supreme Court has held that a court may not create a new Bivens cause of action if Congress or the Executive has already provided “an alternative remedial structure.” Id. at 1804 (quoting Ziglar, 137 S. Ct. at 1858).

### **3. Limitations on Bivens**

In recent years, the Supreme Court has emphasized that recognizing an implied cause of action under Bivens is a “disfavored judicial activity.” Ziglar, 137 S. Ct. at 1857. The Supreme Court has stressed repeatedly that Congress, not the judiciary, should be responsible for providing a damages remedy in most situations. Indeed, in the Supreme Court’s most recent pronouncement on Bivens, Egbert v. Boule, 142 S. Ct. 1793 (2022), the Court explains that the Bivens two-step inquiry “often resolve[s] to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.” 142 S. Ct. at 1803.



Although the Supreme Court in Egbert declares that if it were to decide Bivens today, it would decline to discover any implied causes of action in the Constitution, it did not overturn Bivens. Id. at 1809. In fact, the majority opinion concludes by stating, "to decide the case before us, we need not reconsider Bivens itself." Id.

### **C. Application**

Special Agent Osmanski moves to dismiss because he argues that Egbert v. Boule sharply curtailed the precedent set by Bivens, making it nearly impossible for a plaintiff to bring a Bivens claim against a federal law enforcement officer. Defendant's memorandum of law is peppered with quotes from the Egbert majority opinion in an attempt to suggest that the Supreme Court's disinclination to expand Bivens in fact prohibits almost all Bivens remedies but defendant fails to acknowledge that Bivens and its progeny in the First Circuit remain the law today.

To determine if a Bivens action may proceed, a court must first evaluate whether the claim arises in a "new context," meaning a different setting than those present in the three cases in which the Supreme Court has implied a damages action. Egbert, 142 S. Ct. at 1803.

Osmanski contends that Kennedy's claim presents a new Bivens context and thus the Court must conduct a special factors analysis under step two of the inquiry. In support of that argument, he relies on the fact that the Egbert case presented "almost parallel circumstances" yet the Supreme Court held that Egbert arose in a new Bivens context. Id. at 1805-06. In response, Kennedy submits that Osmanski misconstrues her claim as a new Bivens context, when her case, in fact, falls squarely within the cause of action that the Supreme Court originally created in Bivens.

The Court is unconvinced by defendant's primary argument. Although the facts of Egbert were somewhat comparable to Bivens in that they involved a federal law enforcement officer assaulting a citizen on his own property, the Supreme Court held that Egbert arose in a new national security context because the incident occurred close to the Canadian border and involved a Customs and Border Patrol agent. See id. at 1800-01, 1806.

Defendant next contends that two differences between the facts of Bivens and Kennedy's claim necessitate a finding that the case at bar arises in a new context: (1) Bivens involved agents from the now-defunct Federal Bureau of Narcotics, whereas Osmanski is an FBI agent and (2) the federal agents in Bivens

were without a warrant while Osmanski possessed an arrest warrant for Kennedy's son.

Although Osmanski is correct that an entirely "new category of defendants" arises in a new context, he neglects to mention that such language originated in Correctional Services Corp. v. Malesko, 534 U.S. 61, 68 (2001), in which the Supreme Court declined to apply Bivens to a private prison defendant because corporations are a "new category of defendants." See Ziglar, 137 S. Ct. at 1857 (citing 534 U.S. at 68). FBI agents are not a "new category of defendants." First Circuit precedent allows Bivens claims against FBI agents for Fourth Amendment violations based on unjustified house searches. See Pagán-González v. Moreno, 919 F.3d 582, 600-01 (1st Cir. 2019) (holding that FBI agents were not entitled to qualified immunity in a Bivens action arising from a warrantless search of plaintiff's home in violation of the Fourth Amendment).

Moreover, First Circuit precedent establishes the viability of Bivens claims in the aftermath of an unreasonable search during a routine law enforcement investigation. See DeMayo v. Nugent, 517 F.3d 11, 17 (1st Cir. 2008) (finding the elements of a cause of action under Bivens established when a Drug Enforcement Agency ("DEA") agent and state police officers

unlawfully searched plaintiffs' residence during the controlled delivery of a suspicious package).

An arrest warrant does not permit federal agents to search the home of a third party, such as Kennedy, without exigent circumstances or consent. See United States v. Steagald, 451 U.S. 204, 212-16 & n.7 (1981). Therefore, based on the facts as alleged in the complaint, the possession of an arrest warrant does not negate the unreasonable nature of the search and the Court concludes that Kennedy's claim is not a new Bivens context.

Kennedy's cause of action arises in the same context as that of Bivens itself: federal agents conducting an unreasonable search of someone's residence without a search warrant. Thus, it does not present a new cause of action that would require this Court to proceed to step two to evaluate if there are special factors indicating that Congress would be better suited to create a damages remedy. See Egbert, 142 S. Ct. at 1803. Furthermore, because this Court is not fashioning a new Bivens context, the Court need not consider alternative remedial structures. Id. at 1804.

Egbert did not overrule Bivens nor did it overrule the First Circuit's relevant Bivens jurisprudence. See Pagán-González, 919 F.3d at 600-01; DeMayo, 517 F.3d at 17. This

Court is bound to apply existing First Circuit precedent which would allow a Bivens cause of action under the facts of this case. Accordingly, the Court finds that Kennedy has stated a claim for relief under Bivens against Special Agent Osmanski.

**ORDER**

For the forgoing reasons, the motion of Joseph Osmanski to dismiss (Docket No. 32) is **DENIED**.

**So ordered.**

/s/ Nathaniel M. Gorton  
Nathaniel M. Gorton  
United States District Judge

Dated November 30, 2022